

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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BRENDAN KELLY

v.

LIBERTY INSURANCE CORPORATION,
D/B/A LIBERTY MUTUAL

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15-CV-234-JL
March 23, 2017
2:00 p.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Plaintiff:

Robert A. Stein, Esq.
The Stein Law Firm, PLLC

For the Defendant:

John B. Schulte, Esq.
Schulte Law Office

Nancy D. Adams, Esq.
Lavinia M. Weizel, Esq.
Mintz Levin

Court Reporter:

Susan M. Bateman, LCR, RPR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
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1 P R O C E E D I N G S

2 THE CLERK: The Court has before it for
3 consideration today motion hearing in civil case
4 number 15-CV-234-JL, Kelly versus Liberty Insurance
5 Corporation.

6 THE COURT: Okay. We're here on cross-motions for
7 summary judgment that we've had some pretty extensive
8 briefing on and some extra discovery, and of course I've read
9 your arguments and I'm prepared to hear your -- I've read
10 your submissions, I mean, and I'm prepared to hear your
11 arguments today.

12 Why doesn't everybody identify themselves for the
13 record and we'll proceed.

14 MR. SCHULTE: John Schulte for Liberty Mutual
15 Insurance Company.

16 MS. WEIZEL: Lavinia Weizel for Liberty Mutual
17 Insurance Company.

18 MS. ADAMS: Nancy Adams for Liberty.

19 MR. STEIN: Bob Stein for the plaintiff, Brendan
20 Kelly.

21 THE COURT: There are cross-motions. I'm happy to
22 proceed however you want.

23 MR. STEIN: It matters not to me, Judge. Whatever
24 is convenient for the Court.

25 THE COURT: All right. I guess I'll hear from

1 Liberty first.

2 MS. ADAMS: Sure.

3 Your Honor, we moved for summary judgment. You
4 will recall we had previously filed a motion under Rule
5 12(c).

6 THE COURT: Yes.

7 MS. ADAMS: This is a situation in which the
8 plaintiff was involved in a motor vehicle accident.
9 Following the accident the plaintiff obtained an underinsured
10 payment from the primary carrier, ACE, in the amount of
11 \$1 million, and then it asserted a claim against Liberty, an
12 umbrella policy for effectively excess UM coverage, and as we
13 set forth in our brief --

14 THE COURT: So ACE has paid 900 already, right?

15 MS. ADAMS: Right. That's right.

16 THE COURT: And somebody else paid a hundred?

17 MS. ADAMS: The liability, right.

18 THE COURT: All right.

19 MS. ADAMS: So as we've explained in the brief and
20 we've discussed with your Honor before, this is a situation
21 where the umbrella policy does not afford coverage, and we
22 know it does not afford coverage for two reasons.

23 The first is the insuring agreement. In the
24 insuring agreement itself it provides that Liberty will pay
25 for damages that the insured, which Mr. Kelly would be an

1 insured, becomes legally obligated to pay because of bodily
2 injury or property damage.

3 The whole concept of being legally obligated to pay
4 is a third-party claim. The policy does not afford
5 first-party coverage. Cases around the country that have
6 addressed this issue where an individual such as the
7 plaintiff had sought UM coverage under an umbrella policy
8 have uniformly held that UM coverage is outside the scope of
9 an umbrella policy because the whole purpose of it is to
10 provide third-party or liability coverage.

11 The second reason is there's a specific exclusion
12 on the policy. Again, this is an umbrella policy, which is
13 slightly different than excess. The way we kind of look at
14 it is we think of an umbrella, and so sometimes it can drop
15 down effectively and provide primary coverage.

16 Because of that there's an auto exclusion. Liberty
17 did not want to insure at first dollar one an auto exposure.
18 So this policy includes an exclusion F something that
19 would -- the provision that would exclude the auto risk, and
20 it has two paragraphs which we talk about in our briefs.

21 The first applies to third-party claims. It's
22 talking about how we won't provide a coverage of bodily
23 injury, again property damage, unless the underlying
24 insured's policy provides it, that being ACE. And if that's
25 the case, it will provide coverage but only in an excess

1 right on top of the ACE policy. So explaining that it
2 doesn't provide umbrella coverage.

3 And then, secondly, we have the specific exclusion
4 for UM claims, but that second paragraph deals with all of
5 the different types of first-party exposure, be it
6 comprehensive or collision. And we know that paragraph 1
7 only applies to third-party claims. Again, because it
8 references the BIPD concept. But we also know because the
9 exclusion itself cannot through a carveout or through an
10 exception create coverage that's broader than the policy to
11 begin with. And because the policy to begin with is a
12 liability policy it is not a first-party policy. We know
13 that the exclusion at paragraph 1 is only referencing
14 third-party type claims, which is not what the plaintiff is
15 asserting here against Liberty.

16 A case that is very helpful on this and has some
17 very good language explaining this is a Second Circuit case
18 in which they explained that the nature of liability
19 insurance is too well-settled to permit quibbling about the
20 difference between a first-party claim and third-party claim.

21 A third-party claim where the insured is legally
22 obligated to pay, as opposed to a first-party claim where the
23 insured himself or herself is injured, be it a UM claim, be
24 it a house fire, where you're trying to get compensation for
25 your lost house or your goods or your personal items, those

1 are all first-party claims and we know that this policy would
2 not provide coverage for that.

3 The Second Circuit case in Mazzaferro continues
4 that, "Liability insurance is designed to protect an insured
5 from claims for damages owed by a third person." Again, this
6 liability concept.

7 The distinction between liability insurance and UM
8 coverage is clear and well recognized and then holds that
9 under an umbrella policy, such as one that Liberty Mutual
10 issued to Plum Creek, there is no coverage for UM claims.

11 The policy itself is very clear on that. The issue
12 really that's before the Court is whether or not because of
13 the UM statute in New Hampshire --

14 THE COURT: Whether Plum Creek decline UM.

15 MS. ADAMS: Exactly.

16 THE COURT: I didn't mean to cut you off.

17 MS. ADAMS: That's fine. Yes, they declined
18 coverage.

19 THE COURT: Okay.

20 MS. ADAMS: And what we've submitted to you were
21 five different affidavits.

22 The first affidavit we submitted to you was from
23 Lisa Duetsch. She's the risk manager. She worked at Plum
24 Creek from 2005 to actually 2015 when she left and moved to
25 Bozeman, Montana.

1 After a conference with the Court additional
2 discovery was done. We submitted two additional affidavits
3 of Lisa Duetsch, supplemental affidavits, where she said I
4 was delegated the authority to reject UM coverage, I intended
5 to reject UM coverage, and I was delegated that authority
6 by --

7 I'm sorry. I'll slow down.

8 THE COURT: Let me ask Mr. Stein something about
9 this.

10 MS. ADAMS: Yes.

11 THE COURT: At the end of the day do you dispute
12 actual authority on her part?

13 MR. STEIN: The answer is, and I hate to be this
14 way, an equivocal yes. I dispute in the sense our
15 supplemental pleadings, which I don't want to get into, show
16 why Lisa Duetsch and Kent Jones, the affiants, don't
17 satisfy --

18 THE COURT: I actually accept that argument. Okay.
19 You stand by it is the bottom line.

20 MR. STEIN: Correct.

21 THE COURT: And you also dispute -- you're also not
22 agreeing to apparent authority?

23 MR. STEIN: Correct.

24 THE COURT: Okay.

25 Continue then because I want to hear your argument.

1 MS. ADAMS: Sure.

2 So with respect to Lisa Duetsch -- so she has
3 provided an affidavit saying it was me, I signed the
4 rejection form. She has then said I had authority to sign it
5 from Kent Jones. He was my supervisor. He was the director
6 of accounting and risk manager. We had a discussion about
7 this and he instructed me to reject UM coverage, and I knew
8 it was in Plum Creek's interest to reject UM coverage because
9 they were already providing Workers' Comp. insurance for the
10 plaintiff.

11 And so as Hermes explains, a well-known treatise in
12 the insurance industry, it is not unusual for a corporation
13 such as Plum Creek to reject the UM coverage.

14 We then had a second set of affidavits that were
15 submitted to your Honor from Kent Jones, who was the director
16 of accounting, who said I got my authority from David Brown.
17 He is an officer of the corporation and I'm in charge of
18 insurance, and so I delegated my authority to Lisa Deutsche.

19 Then after we submitted those Mr. Stein submitted a
20 series of questions to us. We then answered the questions.
21 Those were provided to your Honor in the form of affidavits
22 enclosing ten delegations of authority from 2005 all the way
23 to the present saying, here's the authority, Lisa, this is
24 what I want you to do. And if Lisa Deutsche had not rejected
25 UM coverage, then it would have -- she would not have been

1 doing what she had been instructed to do, and it would have
2 been a poor performance.

3 He knew that she was rejecting it because when he
4 was seeing the premium page and the declarations page he
5 wasn't seeing any corresponding premium for UM coverage. So
6 he knew that she was doing what she was supposed to do.

7 So the question is do these affidavits satisfy the
8 apparent authority, and under the law the answer to that is
9 absolutely unequivocally yes.

10 The burden is to show that there is some sort of
11 agency. Under the Restatement it can be employer/employee.
12 It can be apparent authority, which we've shown.

13 Your Honor was concerned that someone couldn't say
14 for themselves that they had authority. I will say that one
15 of your colleagues of the northern district disagrees with
16 that, and with an affidavit of Michael Luck (ph.), and that's
17 in the Stinson case, he said I had authority to do it, I
18 rejected it, and the Court found that that was sufficient on
19 the authority front.

20 Two of the cases cited by Mr. Stein, one of them
21 has an affidavit from the risk manager similar to what we
22 have here, which is Mr. Jones, as well as a second affidavit,
23 saying we wanted to reject it, I had authority to reject it,
24 and I did.

25 In addition, in the Bouffard case, which is the one

1 that started actually down this road, the Court likewise
2 found that there was enough evidence that had been presented
3 to show that there was authority.

4 THE COURT: I don't have any -- I don't really
5 quibble with the fact that if you present this to a jury the
6 jury is probably going to find apparent authority. It looks
7 that way to me.

8 The question becomes is it -- you know, is it --
9 are there no disputes to the point that it is -- you're
10 entitled to judgment as a matter of law? I'm just not even
11 sure, and it's mostly because in 99 percent of the situations
12 like this, let's face it, the plaintiff would say -- yeah,
13 we're not going to argue that question anymore. Mr. Stein is
14 not in that category.

15 MR. STEIN: Thanks a lot, Judge.

16 THE COURT: Well, the same goes for the actual
17 authority. I mean it looks an awful lot like actual
18 authority, but making that -- I think he correctly points out
19 that when you're talking about corporate authority you've got
20 to go right back to how the board issues authority to which
21 officers and from those officers to the actual agent
22 declining the coverage. You go a long way. You just don't
23 get all of the way there.

24 MS. ADAMS: Your Honor, I would respectfully
25 disagree that that is what is required under the statute and

1 that is what would be required in the insurance industry.

2 So we have two affidavits that have been provided
3 to you. One which says I had authority to do this and I did
4 it. A second from the person who gave the authority saying
5 she had the authority. I got it from an officer of the
6 corporation, and here's the delegation.

7 That is sufficient to satisfy Liberty's burden.

8 THE COURT: Under the statute?

9 MS. ADAMS: Under agency law under New Hampshire
10 that is sufficient to satisfy --

11 THE COURT: What statute are you talking about?

12 MS. ADAMS: Well, there's the New Hampshire
13 statute. But when New Hampshire looks at the concept of
14 agency it applies common law principles of agency under the
15 Restatement.

16 THE COURT: Okay. Absolutely.

17 MS. ADAMS: So I would respectfully suggest that we
18 have demonstrated and satisfied our burden that there is
19 apparent authority which is consistent with what you said,
20 that a jury might find that.

21 THE COURT: You're shifting gears. I thought you
22 were telling me that under the statute there's actual
23 authority. You said apparent. There's a difference, of
24 course.

25 Here's what I'm asking you. You give me lots of

1 delegations which I don't have any reason to question, but
2 then you get to the officer. You said officer of the
3 corporation.

4 Now, the way I understand corporation law, that
5 officer may very well have had the authority to delegate
6 this power to decline coverage all the way down the chain,
7 all of the way to Ms. Duetsch, but that has to be set forth
8 somewhere in the bylaws generally. Maybe it is in this
9 company. I don't know. I sense you probably would have
10 given it to me if you could find it, but you haven't.

11 MS. ADAMS: Your Honor, when you're talking about a
12 company under corporate law, the notion that you would
13 delegate down, you have the authority to buy pens, paper, to
14 buy insurance. What's fascinating and ironic about this
15 case, which Bouffard talks about, is that Mr. Stein, or the
16 plaintiff, they don't dispute that Ms. Duetsch and Mr. Jones
17 had the authority to buy the insurance in the first place,
18 right? They would agree that they had the authority to buy
19 it. They're now saying that they don't have apparently the
20 ability to reject it.

21 So the point is that under an apparent --

22 THE COURT: I'm not sure if he did have the
23 authority to buy it. He just doesn't happen to contest the
24 fact that they did.

25 MS. ADAMS: Well, if they don't have the authority

1 to reject it, they don't have the authority to buy it in the
2 first instance.

3 THE COURT: You might be right.

4 MS. ADAMS: And that's what Bouffard talks about.
5 So when you look at apparent authority, I suggest that we
6 have submitted to the Court sufficient evidence to meet that
7 standard consistent with what other courts have done around
8 the country.

9 THE COURT: Yeah.

10 MS. ADAMS: And when you get then to implied
11 authority, or even apparent authority, we have Lisa Duetsch
12 dealing with a broker at Aon who they are working with and
13 negotiating the insurance policy. Aon has been working with
14 Liberty. From Liberty's view they certainly have apparent
15 authority to be moving forward with the insurance.

16 If you were to create a situation where your Honor
17 would say that for any insurance policy issued in New
18 Hampshire we have to have a board resolution or we have to
19 have some sort of a resolution coming from the board that
20 says that this individual has --

21 THE COURT: No, no. But there does have to be --
22 the officer that starts the delegation chain, right,
23 generally has to have authority over the subject matter area
24 for the corporation.

25 MS. ADAMS: Right. So the person who did this was

1 the chief of accounting who gave -- the authority was given.

2 THE COURT: Isn't there a job description of -- I
3 guess -- my guess is -- I only serve on nonprofits. I've
4 seen some bylaws for nonprofits, but I've seen some bylaws
5 for corporations. Generally all those top officers have a
6 job description under the bylaws, and it's fairly clear from
7 that where it proceeds, in which directions. You haven't
8 shown me that in this case.

9 Look, don't get me wrong. I get that by every
10 indication, every available indication, it looks like there's
11 authority here, actual and apparent it looks like. That's
12 why I don't have much doubt at all any trier of fact would
13 find in your favor.

14 I just -- and usually in a situation like this
15 you're going to have the other side saying, look, we concede
16 the issue. You don't have it here.

17 MS. ADAMS: No, I appreciate that.

18 Your Honor, we have put forward -- it's our
19 position, as I know you've heard me say, that we have
20 satisfied the initial burden on this and all the plaintiff is
21 doing is speculating and there's no evidence that's
22 contradicting --

23 THE COURT: When you say the initial burden -- what
24 do you mean by that, the initial burden?

25 MS. ADAMS: Well, what I mean is the Court in State

1 Farm versus Bouffard found that the carrier had the burden to
2 demonstrate the agency, and I would suggest that the five
3 affidavits we've submitted to your Honor satisfy that.

4 THE COURT: So you're saying you satisfied your
5 burden. Okay.

6 MS. ADAMS: And it's consistent with what other
7 courts have done around the country.

8 THE COURT: Understood. Okay. That's on the issue
9 of agency. I'll talk to Mr. Stein about agency and then
10 we'll get to -- we've got a statutory argument and we've got
11 a contract argument, right? We've got a policy argument.

12 Okay. So agency.

13 MR. STEIN: Well, Judge, frankly I think the papers
14 on both sides lay out everybody's positions.

15 THE COURT: They do.

16 MR. STEIN: And I don't want to spend a lot of time
17 on it except to say that I believe the case law and your
18 Honor's suggestions require the moving party to come up with
19 a bylaw, to come up with something that shows that Mr. Jones
20 had the responsibility to do what he did and delegate it to
21 Ms. Duetsch.

22 THE COURT: Or somebody did that gave it to Mr.
23 Jones.

24 MR. STEIN: Either way.

25 THE COURT: Well, let me ask you this. You've been

1 in a few courtrooms in your life.

2 MR. STEIN: Right.

3 THE COURT: Can you imagine a trier of fact in this
4 case who wouldn't find that Ms. Duetsch had the authority
5 based on delegations that go pretty far up the chain here? I
6 mean, it looks like the defendant has crossed all the t's and
7 dotted all the i's within their power. And if they presented
8 that to a jury, even if it's not as a matter of law, can you
9 imagine a jury not finding authority?

10 MR. STEIN: I'm going to be facetious for a second.
11 Who knows what juries would find because there's other
12 evidence involved.

13 It's not the strongest piece of what we have. The
14 strongest piece of what we have is that the alleged rejection
15 form doesn't show up anywhere. That's the strongest piece.

16 So if she has authority delegated by Mr. Jones,
17 it's unclear how that --

18 THE COURT: That she exercised it.

19 MR. STEIN: Exactly. So that answers the authority
20 question. I really think that is the tail, frankly, that
21 wags the dog.

22 But if I can proceed just a tad, I must disagree
23 with my colleague. The starting point here is the statute
24 involved, and if I can have the --

25 THE COURT: You want to talk about the statute?

1 I'll let him go first on the statute and then you
2 can respond.

3 MS. ADAMS: Okay.

4 MR. STEIN: I have this wonderful PowerPoint.

5 THE COURT: He doesn't want to talk about authority
6 very much. I understand. It's your burden.

7 MR. STEIN: It's part of my '60s thing. I just
8 don't like authority, with all respect to the Court. No, I'm
9 just kidding.

10 THE COURT: You have a presentation you want me to
11 look at?

12 MR. STEIN: The answer is yes. The statute is what
13 I want to pop up. I am not going to bore you. I have a
14 complete PowerPoint which I'm not -- repeat not -- going to
15 walk through or bore you with, but I hope to leave for you as
16 my memoranda of law, if you will.

17 THE COURT: You refer to it as much as you like.
18 I'm happy to see whatever you want to present.

19 MR. STEIN: Very good.

20 I want to start with the claim that Ms. Adams made
21 right at the beginning, that there's this distinction, and
22 there is of course a distinction between an umbrella and an
23 excess policy, but the New Hampshire Legislature doesn't
24 appear to care.

25 And so under RSA 264:14, the New Hampshire

1 Legislature, and it's now up on the board, is quite clear in
2 its use of language that for the purpose of the paragraph,
3 264:14, and I'm quoting, "Umbrella or excess policies shall
4 also provide uninsured motorist coverage equal to the limits
5 of liability purchased unless the named insured rejects such
6 coverage in writing."

7 So in terms of the distinction between the two, New
8 Hampshire law doesn't care, it just doesn't care, because the
9 mandatory requirement of 264:14 uses both types of policies.

10 So that's where we start. But ultimately, Judge,
11 ultimately, the case involves a matter of perspective.

12 We have three choices. What a reasonable insured
13 would look at. We have sophisticated lawyers representing
14 Liberty parsing the statute. But quite frankly I think far
15 more important than anything is the Insurance Commission, and
16 from their perspective Liberty represented to them in
17 applying for the right to do business and their policy, and
18 under 412:5 Liberty was required to file its policy forms,
19 endorsements, and other contract language with the
20 Commission, and the language required is as set out on the
21 PowerPoint before you. The statute's language requires
22 submission of the forms that will be part of the insurance
23 policy because ultimately we know this form, while accepted
24 by the Commission, the rejection form, was not part of the
25 policy. It was held in the underwriter's file. When this

1 case surfaced, it took them five weeks to even find it.

2 Moreover, Liberty's submission to the Commission
3 says that it was part of its entire commercial umbrella
4 policy. So when the Commission said, yes, Liberty, you may
5 do business, they expected if you were going to opt out and
6 use the exclusion form, which is laid out right there, that
7 in fact forms would be attached.

8 There's the table of contents. There's the list of
9 forms that were to have been attached. Here specifically is
10 the exclusion, the New Hampshire excess uninsured motorist
11 coverage selection or rejection form, the New Hampshire
12 excess uninsured motorist coverage selection or rejection
13 form set out in Liberty's application, and this is found at
14 Exhibit L to our motion for summary judgment.

15 THE COURT: So what factual inference would a trier
16 of fact draw from that?

17 MR. STEIN: That Liberty, first of all, represented
18 to the Commission that if they were going -- if an insured of
19 Liberty's were going to opt out, that that form would be
20 attached to the policy and that the insured would know about
21 it. That's what a jury would find. And here of course it
22 wasn't and they can't.

23 So as a matter of fact, and of law, we suggest that
24 what Liberty did in this case is, A, an admission of what
25 should be done, and B, what they didn't do. I guess I should

1 have flipped that around. What they didn't do and what they
2 should have done.

3 And consequently, it's an admission by a party that
4 they had applied to the Insurance Commission for coverage and
5 for a form which they ultimately did not use.

6 And the consequence, of course, is obvious. It's
7 obvious from the insured's perspective and from the Court's
8 perspective on this particular motion.

9 Liberty hid the selection form in its underwriting
10 file. It contradicted the representations which were made to
11 the Insurance Commission, and as a result Liberty's failure
12 to attach the form violates New Hampshire law and policy.

13 We suggest, therefore, that Liberty's submission
14 can and should be treated as an admission that it should have
15 attached the rejection form to the policy in order for it to
16 be effective so that everybody knew the fair game.

17 THE COURT: So it's not because any law or any
18 regulation requires the attachment. It's because -- your
19 suggestion is that they're representing that they did or
20 would attach it and did not, right?

21 MR. STEIN: The last part is absolutely true, but
22 the requirement of the submission made to the Insurance
23 Commission under 412:5 requires every insurer shall file
24 policy forms, endorsements, and other contract language with
25 the New Hampshire Insurance Commission.

1 So if the requirement is there for every insurance
2 company to file the papers with the Commission --

3 THE COURT: The papers it will use.

4 MR. STEIN: Yes.

5 Now, I know, I said the same thing. Okay. Well,
6 where's the dots between the promise that it made to the New
7 Hampshire Insurance Commission and the papers it will use.
8 There's not something -- I can't find, and I'm not going to
9 suggest to the Court that I can, that there's a statute that
10 says, and once you file it with the Commission you must use
11 it. Well, I might not be able to find a piece of authority,
12 but what else would it mean?

13 THE COURT: Well, they did use it.

14 MR. STEIN: They had her attach it to the policy.

15 THE COURT: But that's the problem, isn't it?

16 MR. STEIN: Correct.

17 THE COURT: That's your problem, though. I mean
18 they had to attach it to the policy. You say that, but
19 that's not what the law says.

20 MR. STEIN: No, I think it does.

21 THE COURT: Because they shall file policy forms,
22 endorsements -- that's the forms they're going to use in
23 general to do business.

24 MR. STEIN: Right.

25 THE COURT: Well, that is the form they used and it

1 was utilized. You're ignoring the fact that there's no
2 requirement that it be attached.

3 MR. STEIN: Well, you go back to the principal
4 statute and that rule. That's why it becomes, okay, if you
5 want to walk down that road. But when the Insurance
6 Commission approves the contract that Liberty says it's going
7 to use, it also has the law in mind that the statute requires
8 as to excess or umbrella policies. They will be written in
9 the same amount as liability unless there's a waiver.

10 So the actions of the New Hampshire Insurance
11 Commission have to be read in the context of the statute that
12 already exists.

13 THE COURT: I agree.

14 MR. STEIN: And the reason that's important is
15 because, and there are two parts, a reasonable insured needs
16 to be able to read the policy and find out what the coverage
17 is. And in this case it can't be done because it's not
18 there, because the exclusion is not there.

19 We all agree -- they briefed it, we briefed it, I
20 have it in the PowerPoint for you -- that the policy is an
21 integrated policy. It says, this is it. It's all there is.
22 If it's not here, it ain't there. We're entitled to rely on
23 that. They relied on that. And that's why the crux of their
24 argument, and the most important part of their argument, is
25 the exclusions under 2(f)(1) and (2). They ultimately have

1 to rely on that. They ultimately have to say, okay, even if
2 for some reason Stein's -- I don't think they would ever say
3 Stein's right -- but even if for some reason the policy had
4 to have the exclusion attached to it by way of an
5 endorsement, a statement, anything, and I don't care how they
6 do it, to notify the insured that in this particular instance
7 there's not \$5 million of UM, there's 5 million of liability,
8 but the statute doesn't apply. The statutory mandate doesn't
9 apply because they opted out.

10 All well and good. All they had to do as the
11 controller of the policy, the people that write it, the
12 people that are sophisticated and know about the audience and
13 the people who represent to the Insurance Commission what
14 it's going to say, they have to say to the consumer either
15 you're not covered. Look at the endorsement. You're not
16 covered. Look at the attachment or somewhere in the policy.
17 That's why ultimately you get to the (2)(f) arguments.

18 THE COURT: But to the consumer. The policyholder.

19 MR. STEIN: Yeah.

20 THE COURT: That's not the insured. The
21 policyholder is the person who buys the insurance policy,
22 that purchases insurance.

23 MR. STEIN: Well, sure. But under the definition
24 of the policy the insured is both Plum Creek and its
25 employees, and we lay that out again in our papers and in

1 this PowerPoint, quite frankly.

2 And the reason I -- Judge, with all respect, this
3 is a wonderful tool and I'll leave it with you and the other
4 side because it succinctly puts all of my arguments together,
5 but for me to sit here and just walk through a PowerPoint
6 which you can read I just don't think is a good productive
7 use of time.

8 But I can tell you that the best starting point in
9 the analysis from the three perspectives is the Insurance
10 Commission and what was represented by Liberty to the
11 Commission and what the public, i.e., the Commission, had a
12 right to expect as a result of those representations.

13 THE COURT: But I guess that's where I lose you.

14 Okay. That expectation you just added on at the
15 end I guess clarifies it a bit for me. I don't know how it
16 would constitute some type of admission other than here's our
17 umbrella policy and here's the endorsements that we'll use
18 when we sell this insurance.

19 I don't know why you suggested there's a
20 representation that it's always and forever going to attach
21 every time -- attach to every endorsement that's ever
22 adopted.

23 MR. STEIN: Look at the converse. If they had done
24 any of the things we suggest, had Mr. Kelly read the policy,
25 or more important his lawyer read the policy, it would have

1 been right there.

2 Although there's 5 million of liability coverage
3 when you drive a Plum Creek vehicle, which they agree he was
4 doing, on Plum Creek business, which he was doing -- although
5 there's 5 million of liability, you don't have 5 million of
6 UM. It would say it right there. We wouldn't be here.

7 And if he -- when I presented this case to Mr.
8 Covert -- and his e-mails are in the attachments. When I
9 presented this case to Liberty's representative, he couldn't
10 find the exclusion form, either. They had to dig for it.

11 Now, we don't say this in our papers, but it seems
12 to me -- well, we do actually -- that the fact that Liberty's
13 own people couldn't find at the ready the exclusion they're
14 now relying on is also telling as to the obligation that
15 Liberty has to the public when they present a company
16 employee with a car.

17 THE COURT: I struggle with that, but okay.

18 MR. STEIN: Okay. Now, the other perspective -- do
19 you want me to stop now and sit down, or do you want me to
20 address the (2)(f) problem?

21 THE COURT: No. I want to hear from Liberty's
22 counsel on your statutory point.

23 MR. STEIN: Very good.

24 MS. ADAMS: I'm virtually speechless. We argue to
25 this Court in connection with discovery motions that the

1 information from the regulators was not relevant to the
2 policy. When we did the discovery what we learned was in
3 fact that Liberty had submitted the forms to have them
4 approved, both the primary form, the umbrella form that it
5 uses across the country, as well as the rejection form.

6 There were comments from the regulators with
7 respect to it, but the bottom line was the regulators
8 approved them. And you can see from the exhibits, you can
9 see comments where at different times they approved them or
10 there were revisions made to the rejection form.

11 At no time did Liberty represent to anyone that it
12 would attach a copy of the rejection form to the policy
13 itself. There's no evidence to support that whatsoever.

14 With respect to the --

15 THE COURT: And I guess if there's -- I mean, you
16 think it's sort of an implicit admission, right, that they're
17 representing something that is required by statutory purpose
18 or something. I mean, what's the authority for that?

19 MR. STEIN: Are you back to me?

20 THE COURT: Yeah.

21 MR. STEIN: I thought about that. So let's assume
22 an analogy. Let's assume Liberty states, as it does here,
23 that its terms can be amended only by endorsement issued by
24 Liberty and made a part of the policy. Everybody agrees that
25 language is in this policy.

1 Imagine if Plum Creek instructed Liberty to
2 eliminate all of its auto liability coverage and amend the
3 policy accordingly, and Plum Creek did and Liberty did, and
4 Liberty writes an endorsement, excludes all of the liability
5 coverage, and then instead of attaching that exclusion to the
6 policy it files the endorsement in its underwriting policy,
7 just like you have here.

8 A Plum Creek driver believing that he had the
9 protection of an auto liability policy would merrily go down
10 the road thinking he's insured to the tune of \$5 million only
11 to find out that Liberty and Plum had said no, no, no, and he
12 doesn't have the coverage. And theoretically, my theoretical
13 driver, had he known that there was no liability coverage on
14 the Plum Creek auto that he was using, could say, hey, whoa,
15 I've got a logging truck here. I'm not driving this rig down
16 the road unless I've got some liability coverage that's going
17 to protect me and my family. That's the logical extension of
18 their position.

19 THE COURT: Thank you.

20 MS. ADAMS: The statute requires -- the statute
21 provides that the named insured will reject on behalf of
22 every insured. The named insured is Plum Creek.

23 Setting the authority issue aside, Plum Creek
24 rejected UM coverage on behalf of all of its insureds. There
25 is nothing in the statute that says that Plum Creek in order

1 to effectuate coverage, or Liberty, has to provide a copy of
2 its policy to every single driver that gets in a car. That
3 would be illogical, unfair, and unwieldy.

4 We're talking about a company that had nearly 2,000
5 employees across the country. That is not required by the
6 statute. Nor is it required by the statute that the
7 rejection form be attached to the policy. In fact, there are
8 certain states that do have such a requirement. Mexico is
9 one, for example. Florida is another one.

10 For this Court to require that the form be attached
11 to the policy would be adding to the language in the statute
12 and effectively amending it by case law.

13 THE COURT: Yeah.

14 MS. ADAMS: The second piece -- aside from that,
15 the statute here, again unlike others, is evergreen, which
16 means that once you sign the form you don't have to do it
17 every year. In this case Plum Creek did, and presumably
18 because they also rejected in West Virginia, Florida, and
19 Louisiana. And Louisiana, for example, requires that you do
20 it every year.

21 THE COURT: Slow down a little bit for the
22 reporter. Just a little bit.

23 MS. ADAMS: Okay.

24 MR. STEIN: She'll throw things at you. I want you
25 to know.

1 MS. ADAMS: I don't believe that. Maybe a little
2 bit.

3 So this isn't -- so because -- I lost my train of
4 thought.

5 THE COURT: That's okay.

6 MS. ADAMS: This is an evergreen situation, unlike
7 other states.

8 So when Mr. Stein suggests that Mr. Covert who was
9 on the claims side at Liberty Mutual somehow was unable to
10 find a form, the point is that it was in the underwriting
11 file. They had to go to the underwriting file and get the
12 file. It wasn't that it was hidden from anyone or Liberty
13 was trying to mislead anyone.

14 Plum Creek, the insured, who has the right to
15 reject on behalf of all insureds, had rejected it. It was in
16 the underwriting file, which is exactly where it should have
17 been. Nothing in the statute requires that it be attached.
18 In fact, if you are the insured and you looked at the policy
19 what you would notice is, one, it provides coverage only for
20 third-party claims, i.e., those claims where the insured has
21 a legal objection to pay a third-party.

22 You would also notice that there's no limit for UM
23 coverage, that there's no premium charged for UM coverage and
24 that there's an exclusion for UM coverage, which I think is
25 where we left off with Mr. Stein, and that's exclusion (f) of

1 the policy.

2 So this is not a situation where Mr. Kelly has some
3 reasonable expectation that there is UM coverage. To the
4 extent, as Mr. Stein argues in his pleadings, that he is
5 presumed and of the law, i.e., he's presumed to know that the
6 statute exists, he's also presumed to know that the company
7 can reject it, which here Plum Creek did.

8 THE COURT: When you say he's presumed to -- where
9 does that presumption come from? What's the source of that
10 presumption?

11 MS. ADAMS: In plaintiff's papers they take the
12 position that an individual is presumed to know the law, and
13 that without any affidavits from the plaintiff that somehow
14 he believed he had UM coverage because he knows that the
15 statute is out there. Well, if he knows the statute is out
16 there, he knows what the last sentence says as well.

17 MR. STEIN: Well, with all respect, that puts an
18 impossible burden on any claim. I mean, I have two irons
19 here. If you go watch television for an evening, you will
20 find Liberty's ads on TV, but their plain language of their
21 policy -- so everybody is on the same page, there's nothing
22 plain in the language of this policy.

23 First-party and third-party are never defined.
24 Although made a big part of their case, they're never defined
25 in the policy. So the average citizen has no clue if he were

1 to read the policy.

2 The New Hampshire Supreme Court has not made it
3 that stringent that the average citizen driving a rig with
4 logs behind has to be sophisticated enough to read the
5 policy. That's why I say the lawyer who --

6 THE COURT: When you make that argument, I think it
7 undermines your position. What employee brings counsel in to
8 read the policy?

9 MR. STEIN: And shouldn't have to. He should be
10 able to say clearly to his employer, when I drive down the
11 road what's the coverage.

12 THE COURT: Yeah, he should be able to say that to
13 his employer.

14 MR. STEIN: Right. And the history, by the way, of
15 this statute, the UM being grafted on, is not known to many
16 lawyers, except old people like myself. In the old days when
17 there was an accident and there was minimal insurance and
18 suddenly a plaintiff who is badly injured is looking to find
19 out if he's covered, and the answer is, no, the guy that hit
20 you has 25,000, and then he goes to a lawyer and the lawyer
21 tells him, well, did you purchase UM coverage. Well, no, I
22 didn't. I didn't even know what it was.

23 So in the old days before the statute lawyers were
24 suing agents for not providing UM as an agency malpractice,
25 if you will. And so the legislature came and said we're

1 going to make an end to this. When you provide liability,
2 you provide UM in the same amount, and that's the statute.

3 So that's really where we are, and that's really
4 some people say my strongest argument. I don't think it is,
5 but be that as it may.

6 The legislature mandates that when you write
7 liability, you write UM. \$5 million of liability has been
8 written by Liberty. There should have been 5 million of UM
9 unless or until in writing they waive.

10 Why would the term in writing be there? Well, the
11 answer is so somebody could see it. That's why I'm making
12 such a big stink about the fact that --

13 THE COURT: Isn't it just as likely that the
14 requirement is -- first of all, if it was so someone could
15 see it, it would say written and attached. And if it doesn't
16 say written and attached, the reason it's required to be in
17 writing -- not that I really question reasons for statutes.
18 I just don't do that generally. But if I'm going to play
19 that game, the reason something must be in writing is so it's
20 memorialized, not so much memorialized and seen by every
21 single viewer, right?

22 MR. STEIN: And that's the same coin I'm talking
23 about. Memorialized is the head. The tail is so it can be
24 seen by whoever is going to look at it.

25 And here's the thing that I heard which really I

1 find difficult to understand.

2 THE COURT: What?

3 MR. STEIN: Ms. Adams, skilled as she is, talks
4 about the nature of this particular company, the number of
5 employers, the number of vehicles doing business across the
6 land.

7 Now, this is not an argument that's going to win
8 for me, but in discovery we now know that for an extra 900
9 bucks Liberty could have insured UM in three states. That's,
10 again, historically what we know, too, that umbrella policies
11 or excess policies, whichever you call them, are relatively
12 inexpensive.

13 The other thing that the language of this policy
14 talks about when we get to (2)(f) specifically, is it
15 incorporates by reference the underlying policy, the ACE
16 policy, the ACE policy that paid \$900,000.

17 And so it's not circular. It's direct. If we had
18 been there before Mr. Kelly decided to drive the vehicle, we
19 would have said, okay, let's look at the underlying policy,
20 okay?

21 The (2)(f) part of all of this is I think --

22 THE COURT: Hold on a minute.

23 You might not have been done with your presentation
24 on -- if you were, that's fine -- on the statutory
25 requirements here.

1 MS. ADAMS: This is all about the named insured,
2 Plum Creek, having the right to buy or not buy this
3 insurance.

4 THE COURT: Right.

5 MS. ADAMS: Plum Creek has the right to contract as
6 it sees fit. It may have been \$900, it may have been less,
7 in order to buy UM coverage.

8 THE COURT: It's not really for me to get into.

9 MS. ADAMS: They made the corporate decision not to
10 do it. As Lisa Duetsch explained, which is consistent with
11 what treatises have done, is that corporations routinely deny
12 at the umbrella level buying this coverage because they have
13 Workers' Comp. coverage for their employees.

14 THE COURT: Let me ask you something from your
15 presentation that -- maybe I don't need to be distracted by
16 it, but it's this. I view this case as a case that comes
17 down to whether Plum Creek rejected UM coverage, that's what
18 the case is about, but you keep talking -- I don't want to
19 disparage your argument. You started talking about
20 third-party versus first-party. Why does that make any
21 difference to this analysis?

22 MS. ADAMS: I think -- the point is that the policy
23 itself does not provide coverage for UM unless the statute
24 either broadens the insuring agreement or the statute
25 eliminates the exclusion. So, yes, it --

1 THE COURT: And the statute does in this case. It
2 broadens it unless rejected.

3 MS. ADAMS: Exactly.

4 THE COURT: Okay. You're just sort of orienting me
5 in the bigger policy and bringing me to --

6 MS. ADAMS: Exactly.

7 THE COURT: Okay. Thank you.

8 All right. You want to talk about the exclusion
9 2(f) in the policy?

10 MR. STEIN: I do. I tell you what I thought I was
11 going to hear, and I'm a little surprised I didn't. I
12 thought Ms. Adams would basically be saying, okay, the
13 exclusion is not part of the policy and Stein is making at
14 least a colorable claim, but even so the language of the
15 policy itself, which they say in their brief at 2(f)(1) and
16 (2) excludes coverage.

17 And here's the problem with that. And I think
18 that's their strongest argument because we all know that the
19 entire language of this 60-page policy has to be read in its
20 entirety.

21 The problem with that is that the exclusion broken
22 down into two sections, 2(f)(1) and 2(f)(2), they pars out to
23 third and first-party claims. Fine. So far so good.

24 But first-party versus third-party claims are, A,
25 never defined; (f)(1) and (f)(2) are ambiguous, confusing, and

1 contradictory, and inherently inconsistent.

2 The auto coverages are found here at Exhibit A for
3 our motion for summary judgment, page 46. That's where
4 you'll find 2(f)(1) and (2).

5 And I call this ping-pong drafting because the
6 statute starts off with defining bodily injury or property
7 damage which is not covered arising out of the ownership,
8 maintenance, use or entrustment to others of any auto. But
9 then it says the use includes operation and loading or
10 unloading, and then it says, "This exclusion does not apply,
11 however, if the bodily injury or property damage is covered
12 by underlying insurance." And in this case, of course, it
13 is. Coverage provided will follow the terms and conditions
14 of the underlying insurance.

15 So on the one hand Liberty is saying here's no
16 coverage, here's no coverage at all, but on the other hand
17 here is coverage. So ping-pong. Back and forth.

18 THE COURT: Yeah. That's how insurance policies
19 read sometimes. They do.

20 MR. STEIN: I'm sorry?

21 THE COURT: That's how insurance policies read
22 sometimes.

23 MR. STEIN: And that's why those policies that read
24 that way are ambiguous, not cognizable by the New Hampshire
25 Supreme Court, and as a matter of statutory common law and

1 common sense should be rejected by courts.

2 THE COURT: I get it.

3 MR. STEIN: So 2(f)(1), again we say for the
4 reasons set out on the slides, does not help their case. You
5 won't see the term first-party or third-party in any of that
6 language. Only lawyers figure that out or people who draft
7 policies.

8 Whatever 2(f)(1) and 2(f)(2) says, however, has to
9 always be read in the context of 264:15 which provides and
10 goes back to the touchstone of my argument that UM and excess
11 policies have to have liability as well as UM attached to
12 them.

13 By its own definition, 2(f)(1) appears to apply to
14 auto coverages, and it makes clear, however, that the
15 coverage will be narrower. It's a form following situation.

16 So the reasonable insured having read that language
17 would turn to his ACE policy, the primary policy. And the
18 ACE policy which you have there is for business auto
19 declarations. The named insured is Plum Creek. And as an
20 employee of Plum Creek, Brendan Kelly is entitled to the
21 benefits of the policy. The liability is in the amount of a
22 million dollars. Uninsured motorist is covered in that as
23 well, and ultimately is was deemed to be \$1 million.

24 By the way, it took convincing to get ACE to pony
25 up the \$900,000 because they said, well, we don't see

1 anything here, it's 25,000. I said it doesn't work that way
2 and I had to show them the coverage, but they did it.

3 And there's again in the ACE policy the New
4 Hampshire insurance coverage, a million dollars. At least in
5 this particular analysis if the insured goes to the ACE
6 policy he sees there's coverage for UM in the amount of a
7 million dollars.

8 They then turn to 2(f)(2). But again, 2(f)(2) has
9 to comply with RSA 264:15. You can't exclude the provisions
10 of 264:15 by just some language. 2(f)(2) provides, and there
11 it is laid out for you in glorious PowerPoint that any loss,
12 cost or expense payable under or resulting from a first-party
13 physical damage coverage, no-fault, personal injury, or auto,
14 or underinsured or uninsured motorist law, except to the
15 extent coverage is specifically provided by endorsement in
16 this policy. There's the ping-pong again.

17 So what does all that mean? Well, it purports to
18 exclude coverage for uninsured and underinsured, but it would
19 be void under 264:15 because it's not a written exclusion as
20 mandated by what we talked about earlier, about 40 minutes
21 ago.

22 And so under the case law we cite there, National
23 Fire Companies, and the language itself, we suggest 2(f)(2)
24 is unenforceable if there's no effective rejection of the UM
25 coverage.

1 And for that proposition we not only have that
2 little PowerPoint slide, but we quote on the slide from their
3 brief at page 13, "In the event a court were to find that an
4 insured failed to validly reject UM coverage, then for claims
5 subject to the New Hampshire UM statute the exclusion would
6 be unenforceable." That's from their memorandum of law. I
7 think we are actually close on that.

8 So there you have it, and there's our conclusion.

9 THE COURT: You know, you went back a couple of
10 slides and you showed me something that you drew from their
11 brief and that made me think of something I wanted to ask you
12 about.

13 You said you wanted to leave this with me, this
14 presentation.

15 MR. STEIN: Yeah.

16 THE COURT: The presentation is very nice and I
17 appreciate it, but I don't want to create the impression with
18 you that this is a brief because -- for example, your whole
19 argument about admissions made to the Insurance Department.
20 If you briefed that, I overlooked it.

21 MR. STEIN: Right.

22 THE COURT: Did you brief it? I don't think you
23 did.

24 MS. ADAMS: No.

25 MR. STEIN: Let me put it this way. I think we

1 did.

2 THE COURT: Okay. Look, I know you're not trying
3 to throw it by me, but here's my point. I'm hearing oral
4 argument. I've got to decide this case. I don't want you to
5 leave this here with me. This is your presentation. I don't
6 want the suggestion later that that's an argument that I
7 considered before today. That's an oral argument you made,
8 and I don't generally embrace arguments made for the first
9 time in oral argument because I haven't considered them.

10 I tried to understand it. It was very interesting,
11 but it wasn't something I was absorbing too well I think
12 because I had never seen it before.

13 I'm happy to watch this, but the only way -- and
14 I'm not even going to try to make a deal with you about the
15 circumstances under which you can leave it with me because
16 that's been happening lately. I have people coming in here
17 giving me presentations, and sometimes they have like six,
18 seven case cites in them that aren't briefed. I have to have
19 some way of managing my time.

20 MR. STEIN: Sure. Judge, let me tell you why I did
21 it. As I'm going -- and it simplifies it because I'm a
22 simple country lawyer.

23 THE COURT: Right.

24 MR. STEIN: I try that. I do the best I can.

25 THE COURT: Yeah.

1 MR. STEIN: My point is it does simplify the
2 argument. On the other hand, as an advocate for me to just
3 hit the button and walk through the slides, while it's
4 effective, it's boring. It's going to bore you. It's going
5 to bore me.

6 THE COURT: It's really helpful to blow up policy
7 language. It really is.

8 MR. STEIN: Yes.

9 THE COURT: But when you -- look, I'm going to tell
10 you the truth, I don't think there's much statutory -- I
11 don't think your statute-based claim or your contract-based
12 claim -- I think I can decide those on summary judgment. I
13 happen to disagree with you on what those -- what the statute
14 and the contract require.

15 I think you're right about the agency, by the way.
16 Although anybody in your position would have conceded those
17 issues by now, but you don't and you don't have to.

18 But on the law and on the contract I think you're
19 wrong. But when you start conflating it with admissions made
20 to the Department of Insurance -- I don't even know what
21 that's about. I understand now what you're trying to say to
22 me, but those weren't arguments that were briefed and those
23 aren't arguments that I'm going to consider.

24 MR. STEIN: In fairness to Diane Hock who works
25 with me on these things, these were all briefed, and indeed

1 part of our briefs talk about, as today, representations of
2 the New Hampshire Insurance Commission, and the brief talks
3 about it as an admission. This is just a summary of the
4 briefs. If you won't take it, God bless you, fine.

5 THE COURT: Hold on. If it only summarizes what's
6 in the briefs --

7 MR. STEIN: I believe it does. If it doesn't, then
8 reject it out of hand.

9 THE COURT: Well, here's what I'm going to do. I'm
10 going to hear from defense counsel for a minute. I want you
11 to find in your brief where you make that argument or
12 something remotely connected to it.

13 MR. STEIN: Okay.

14 THE COURT: Because I've read the briefs and I
15 didn't see it.

16 Go ahead.

17 MS. ADAMS: So with respect to the argument that
18 Mr. Stein was just making, and I heard your Honor's comment,
19 but the statute itself does not require that there be an
20 exclusion in the policy. It just requires that there be UM
21 coverage provided if you don't effectively do the rejection.

22 With respect to the exclusion itself, the (f), the
23 paragraph (1) and the paragraph (2), another creative lawyer
24 similar to Mr. Stein made this argument in New York in the
25 federal court, and on appeal the Second Circuit said, "The

1 Court relied on a warped interpretation of the endorsement to
2 require UM coverage. In so doing, the Court was indulging in
3 a forced construction and torturing words to import ambiguity
4 where the ordinary meaning leaves no room for ambiguity."

5 THE COURT: What case did you just cite, by the
6 way?

7 MS. ADAMS: Mazzaferro, M-A-Z-Z-A-F-E-R-R-O, and it
8 is 50 F.3d 137.

9 THE COURT: Second Circuit?

10 MS. ADAMS: Yes.

11 THE COURT: What year?

12 MS. ADAMS: '94.

13 THE COURT: Thanks. Okay.

14 MS. ADAMS: The point of (f)(1) and (f)(2), and
15 this gets back to your Honor asking me why in the beginning
16 did I start with a discussion of the policy itself, is that
17 the umbrella policy provides third-party coverage, liability
18 coverage, which the Second Circuit, you know, talks about and
19 other cases have talked about.

20 Paragraph (1) deals exclusively with third-party
21 coverage. It only deals with situations where there are
22 claims for bodily injury and property damage where an insured
23 is legally obligated to pay.

24 Paragraph (2) excludes first-party claims,
25 including UM coverage. Yes, it says at the end unless an

1 endorsement were to provide it, because some companies in
2 fact buy excess UM coverage and thus there would be an
3 endorsement attached to the policy providing the UM coverage
4 on an excess basis.

5 That didn't happen here. I would suggest that the
6 plain -- you can try to cobble together an argument, and Mr.
7 Stein has been very creative in doing that, but the plain
8 language of exclusion (f) demonstrates that UM coverage is
9 excluded. The only issue is whether or not the statutory
10 rejection form was supplied.

11 THE COURT: Okay.

12 MS. ADAMS: Or whether they effectively rejected, I
13 should say, the coverage.

14 THE COURT: Yes, Mr. Stein.

15 MR. STEIN: Yeah, I have found what you're looking
16 for, and that is to say in our first opening brief, which was
17 May 20th, at page 14, section C, the New Hampshire Insurance
18 Commission approval of the rejection form in isolation --

19 THE COURT: That's your objection to Liberty's
20 motion?

21 MR. STEIN: No, this is in our motion.

22 THE COURT: Do you know what document it is?

23 MR. STEIN: Yes, I do. 27.

24 THE COURT: Okay.

25 MR. STEIN: So we set it out there, and I think if

1 I get another page into it I can actually find the word
2 admission because they argue in their brief that when the New
3 Hampshire Insurance Commission approved their forms that
4 therefore they've complied with the statute, and that's what
5 triggered off our research to show the opposing situation.

6 In just flipping through my papers, I think it's
7 also important to remember the Supreme Court of New Hampshire
8 has said -- I had it in front of me -- that, "Men in general
9 cannot read and understand insurance documents." That's the
10 Trombly case. I think that's a fair statement. It is what
11 it is.

12 That's why I'm always amused when I'm sitting there
13 watching TV, on the one hour I give myself, when Liberty pops
14 up. When I'm trying to avoid the work from the office and
15 there's Liberty in its commercial saying we have a clear
16 contract and we cover all of this, I want to call Ms. Adams
17 up and say would you watch the show that I'm watching,
18 please.

19 THE COURT: Yeah. Okay.

20 MS. ADAMS: Your Honor, one final point, if I
21 could, not to beat a dead horse.

22 THE COURT: No, I don't mind.

23 MS. ADAMS: But to return kind of back to where we
24 started on the agency. Mr. Stein attached the bylaws of the
25 company to his papers. And as you'll see, as with many

1 public companies, they're incredibly broad. Nonprofit
2 entities have very narrow and very specific bylaws.

3 And in fact one of the cases cited by Mr. Stein out
4 of Louisiana there was a trust and they were very specific
5 about what could and couldn't be done in terms of rejecting
6 UM coverage, and the person who effectively rejected it
7 didn't even know that he was rejecting it and the board had
8 to make that decision.

9 These bylaws are very different. They are very
10 broad. We have an individual who was an officer, and it's
11 our position, as you know, that we have not only actual,
12 apparent, and implied authority, but it's also important to
13 recognize that this had been done since at least 2005, and to
14 the extent --

15 THE COURT: That certainly goes to the apparent
16 authority argument.

17 MS. ADAMS: It also goes to whether it was ratified
18 by Plum Creek.

19 THE COURT: Ratified?

20 MS. ADAMS: Ratified.

21 MR. STEIN: That's the problem.

22 THE COURT: What?

23 MR. STEIN: The ratification.

24 THE COURT: What do you mean it's a problem?

25 MR. STEIN: They're obligated in this forum, in

1 this case, before this Judge, to show actual -- or if not, if
2 they can't make actual, apparent authority.

3 Now, they can do it in a variety of ways. My guess
4 is they looked and found out that some of these actors were
5 no longer around, but how tough is it to actually be specific
6 to say I'm on the board, or I'm the president or the vice
7 president, and acting pursuant to the vague grant of
8 authority of the bylaws I can tell you specifically it was my
9 intent to give Kent Jones and therefore Ms. Duetsch
10 authority. '

11 They didn't do it, and we didn't want to beat that
12 horse anymore or delay any more than we already have.

13 THE COURT: I gave everybody extra briefing, extra
14 time to do that.

15 MR. STEIN: Yes, you did.

16 THE COURT: It's not that your argument is
17 unreasonable in any way. It isn't. It's just that corporate
18 authority is one of those things that is frequently sort of
19 conceded after a time because it looks pretty good. It looks
20 pretty valid.

21 But I think any corporate treatise tells you that
22 the only way employees and agents can act on behalf of a
23 corporation is with some type of grant of authority. That
24 can be apparent, but generally in New Hampshire apparent
25 authority questions are jury questions.

1 MS. ADAMS: I agree it's an issue of fact. I do
2 agree it's an issue of fact. It's just our point is that we
3 have provided enough facts for you to make that finding
4 without anything coming to you to dispute in any way that
5 fact other than sheer speculation, and under Rule 56 that's
6 sufficient for summary judgment.

7 THE COURT: Yeah, I don't think I can consider it,
8 it's your speculation, but I understand your point.

9 Anything else you want to say, Mr. Stein?

10 MR. STEIN: No, sir, but I would offer these
11 PowerPoints. I have one for my colleague and one for you.
12 Should you decide not to use it, fine, but I really do think
13 it will help your analysis because of the pop-ups if nothing
14 else.

15 MS. ADAMS: And I would object to that.

16 THE COURT: Yeah. Well, if she objects, I really
17 can't accept it, to be honest. I have it and I've viewed it.
18 I don't want to make it part of the record if we have counsel
19 objecting to it.

20 MR. STEIN: Well, then in fairness I would like to
21 mark it for identification. It's not part of the record, but
22 at least it's, I guess theoretically, what was not allowed.

23 THE COURT: I mean, do you have some argument that
24 I'm supposed to allow you to supplement the record of oral
25 argument at summary judgment?

1 MR. STEIN: No. I want to be clear I'm not trying
2 to supplement the record.

3 THE COURT: Okay.

4 MR. STEIN: Again, I'm not trying to sandbag.
5 There's no new authority. There's the one analogy I already
6 showed you which came to me in the dead of night.

7 THE COURT: If we have an agreement, I'll tell you
8 right now -- here's the thing. For whatever reason I've
9 gained a reputation for enjoying oral argument. It's not
10 that I enjoy holding oral argument. I hold oral argument on
11 these cases all of the time because I think it helps. But
12 what happens is people take advantage and they sneak new
13 arguments and evidence in, and I don't appreciate that. It
14 makes the job harder.

15 So if we have an agreement that it's not part of
16 the record that will be cited on appeal, I'll accept it.

17 MR. STEIN: I so agree because my whole goal in
18 this was to make your job -- how is this going to come out --
19 make your job easier.

20 MS. ADAMS: My point on this, and not to be prickly
21 about this, is that this is something that we have not seen.
22 He is submitting to you an entire PowerPoint that has many
23 pages that we haven't even seen up on the screen, and whether
24 it's marked for identification or as an exhibit, it's
25 something that we don't even know what's in it or have the

1 ability to respond to.

2 THE COURT: Do you want the ability to respond to
3 it?

4 MS. ADAMS: If your Honor would like a briefing.

5 THE COURT: No, I don't want more briefing. I
6 don't.

7 MS. ADAMS: I just don't see the point of even
8 giving it to your Honor if it's not going to be used for any
9 purpose.

10 THE COURT: Here's what I'm going to do. Look, I'm
11 not comfortable accepting it over objection, and she's
12 raising an objection. The same way you're objecting to what
13 looks like pretty clear authority on the part of the agent,
14 you have the right to object. You both do. So I'm going to
15 honor both your objections. I'm not going to allow the
16 PowerPoint, but I'm also not going to grant summary judgment
17 on the authority issue.

18 So let's go off the record here for a minute and
19 talk logistics, and then we'll come back on the record.

20 MR. STEIN: Sure.

21 (OFF THE RECORD)

22 THE COURT: Let me take a little five minute
23 recess. I'll talk to my law clerk for a minute.

24 (RECESS)

25 THE COURT: A couple of points.

1 I'm sensitive to the right to try one's case, and I
2 might be overindulging here a little bit for the plaintiffs
3 so I want to test a few ideas.

4 First of all, I've been talking about a jury trial.
5 This is not a jury trial. You didn't ask for a jury trial.
6 You asked for a DJ decision. You didn't check jury trial.
7 If there's going to be a trial, it's going to be before the
8 Court unless somebody tells me there's some right to a jury
9 trial that's been granted here that I'm not aware of. But
10 all the documents, we just looked through the whole case, you
11 didn't ask for a jury, and there's not one available under
12 the statute you sued under, which is 491:22, as far as I
13 know. So there's that. It still could be a trial, though.

14 I guess before we are going to have a trial like
15 that I need to know -- here's the thing. I focused when we
16 first started on agency because although I don't think as a
17 matter of summary judgment that actual authority has been
18 proven such that there's no issues of material fact, it's
19 very close, but I don't think that's the case. It doesn't
20 matter if there's no actual authority if there is apparent
21 authority to decline coverage here, and the defendant has
22 made a very strong showing for apparent authority.

23 As a matter of fact, I'm going to ask counsel,
24 since we're sitting here, to summarize your case for me under
25 apparent authority to decline UM coverage. Ms. Duetsch.

1 MS. ADAMS: She had the delegation from Mr. Jones.
2 She worked with the broker. They submitted -- Liberty Mutual
3 asked if they wanted UM coverage. Lisa Duetsch signed the
4 form, gave it to the broker, and gave it to Liberty Mutual.

5 THE COURT: What's her title?

6 MS. ADAMS: Her title is risk manager.

7 THE COURT: Don't get impatient with me.

8 MS. ADAMS: No, I'm not. I'm not. It's risk
9 manager.

10 THE COURT: I'm just trying to make a record here.

11 Now, is there any evidence in the record from
12 anyone who would suggest she lacked authority to do this, any
13 witness?

14 MS. ADAMS: No.

15 THE COURT: Internally or externally?

16 MS. ADAMS: No.

17 THE COURT: I have to ask you, Mr. Stein, all
18 right, in a trial -- now, I think I've only -- in a
19 declaratory judgment case on coverage, which is what this is,
20 who carries the burden?

21 MR. STEIN: We both do.

22 THE COURT: Okay. Explain.

23 MR. STEIN: I think anybody who wants summary
24 judgment has the burden.

25 THE COURT: I'm talking about at the trial we're

1 talking about having, which will be a bench trial.

2 You're asking for coverage under the policy which I
3 don't think the law provides for. In other words, I
4 don't think -- the question for the bench trial will be did
5 Ms. Duetsch effectively deny coverage, or did Plum Creek
6 effectively decline UM coverage through Ms. Duetsch's
7 exercise of her authority.

8 I assume there will be evidence put on of her
9 actual authority and her apparent authority.

10 MS. ADAMS: Correct.

11 THE COURT: I don't think it matters though if she
12 lacked actual if she had apparent authority, and you don't
13 dispute that. Do you dispute that?

14 MR. STEIN: Judge, I was actually thinking about
15 something else when you were --

16 THE COURT: Let me ask it again then.

17 Even if she lacked actual authority, if she had
18 apparent authority her rejection of UM coverage was effective
19 in this case.

20 MR. STEIN: The answer to both questions is I would
21 put to her on the stand -- and I think they have the burden,
22 by the way. I'll tell you why in a minute. I would put to
23 her on the stand her job description, which is in the papers,
24 and there's nothing in her job description that says you will
25 accept or reject UM coverage.

1 THE COURT: That's for actual authority. I'm
2 talking about apparent authority. The people who -- in other
3 words, that involves I think a function of two things under
4 agency law; people who dealt with her within her own company
5 and people who dealt with her at arm's length and whether
6 anybody in that position would regard her as having
7 authority.

8 And she has exercised it. One thing that defense
9 counsel had mentioned, she's exercised it for many years.

10 MR. STEIN: She's exercised it since 2005, and this
11 accident --

12 THE COURT: That's over ten years.

13 MR. STEIN: But the law changed, too. She's going
14 to be on the stand by way of deposition or trial testimony
15 and will be grilled by me about who told her what about what
16 in terms of the actual.

17 Now, in terms of apparent then you get the
18 question, how far did she range from what would be apparent
19 authority. How much did she know or study this issue. I
20 haven't thought the rest through, quite frankly.

21 THE COURT: Well, for apparent authority it isn't
22 about how much she studied the issue. It's about how she
23 behaved when she acted on behalf of Plum Creek in dealing
24 with insurance brokers, you know, any number of people, her
25 own superiors.

1 What evidence would you present? I mean, you've
2 had time to do discovery now. What evidence would you
3 present to me to suggest she lacked apparent authority to
4 decline UM coverage?

5 MR. STEIN: I don't have an answer for you.

6 THE COURT: All right. Do you agree with me -- I
7 think I just asked you this. Sorry if I'm asking again.

8 If she had apparent authority, it doesn't matter if
9 she lacked actual authority?

10 MR. STEIN: And that would be what you would charge
11 the jury or charge yourself.

12 THE COURT: So it has to be what I know as a matter
13 of law, and you agree.

14 MR. STEIN: Yeah.

15 THE COURT: I think then before -- if I asked you
16 to present whatever evidence you could, you said you didn't
17 have an answer for me now, and that's an honest answer. If I
18 said I would give you an opportunity to do that, present to
19 me something, you would probably -- I mean, would you want to
20 go get it? Would you want to do anymore discovery or would
21 you want to just make an offer of proof and attach that?
22 What would you do to say to me she lacked apparent authority?
23 Because all the evidence I'm aware of looks like she had
24 apparent authority.

25 MR. STEIN: We would have to put her under oath

1 either here or there.

2 THE COURT: Has she been deposed?

3 MR. STEIN: No.

4 THE COURT: Okay. That's an honest answer. That
5 might be -- what made me think of that is your point about
6 having to track down the chain of command and all that.

7 What do you think about the idea of Mr. Stein takes
8 her deposition and he presents it. And you could do it too,
9 by the way. You could do a trial depo of Ms. Duetsch.

10 MS. ADAMS: Just to correct the record, I think I
11 said she was the risk manager. Her actual title is manager
12 of risk and insurance for Plum Creek just to correct that.

13 THE COURT: I thought you were going to tell me it
14 was UM decliner in chief. No.

15 What's her title?

16 MS. ADAMS: Yeah, that too.

17 With respect to the burden question, it's Liberty's
18 position that it would be Mr. Stein's burden of proof because
19 the insured has the burden of proof coverage and therefore it
20 would be his burden on that front.

21 With respect to the depositions, Mr. Stein was
22 afforded the opportunity to take Lisa Duetsch's deposition
23 and Kent Jones' deposition. They were aware of it and they
24 had agreed to it. We were trying to figure out a means to do
25 that. If we need to do that, that's fine.

1 MR. STEIN: And that is true. What Ms. Adams said
2 is true. They gave me the opportunity to take her
3 depositions with regard to the issues in the papers.

4 But now we're talking about a trial, and now I need
5 to actually go out there and take a discovery deposition
6 followed by a trial deposition, or however it's going to
7 work. And particularly since Rule 50 sanctions are always a
8 possibility, therefore I need to make a trail because it's
9 not apparent from the papers. And I believe that once we
10 establish there's a contract, the party with all the tools to
11 dispute that contract, Plum Creek, Liberty has the burden.

12 THE COURT: I'll figure that out.

13 MR. STEIN: Sure. And it may be --

14 THE COURT: Here's why we're having the
15 conversation. You wrote a terrific brief, Mr. Stein, on
16 actual authority. I mean, you've squeezed that lemon for
17 every drop, and in a case that looks like there's actual
18 authority -- I conclude you're correct, it hasn't been proven
19 for summary judgment purposes, but compliment time is over.
20 You didn't develop any argument to speak of on apparent
21 authority.

22 Now, that could be a number of things. It might
23 have just been you thought it wasn't that important or
24 something, but the teeth aren't there like they're there with
25 actual authority.

1 So I guess I'm a little reluctant to do it, but it
2 seems to me that with one deposition -- and you could do a
3 depo, a trial depo. Frankly, without a jury, Mr. Stein, I
4 don't know why you would need to do that. One depo would do
5 it and that could lead to -- you know, and you could present
6 it to me. You could submit it with a brief, both sides
7 could, and I could decide the case, rather than the trial
8 that -- the trial that I was talking about before when I
9 thought you had a right to a jury trial, because that would
10 be a different kettle of fish, I agree.

11 But when you're talking about the Court, you know,
12 I've seen all the evidence now, and there's only one thing I
13 need to see and that's Ms. Duetsch on the issue of apparent
14 authority.

15 So let me ask while we're sitting here -- go ahead.

16 MR. STEIN: Well, I think I hear what you're
17 saying, and you're really saying that the trial in front of
18 you is identical as the last part of the motion for summary
19 judgment.

20 THE COURT: Sort of. Although I'm ready to decline
21 summary judgment on the issue of agency is what I'm saying,
22 and at a trial. But when I asked you what would you do to
23 prove a lack of apparent authority, you said Duetsch. And if
24 it's Duetsch, if that's your trial, I don't think you need me
25 to be there when you question her. You can have me there.

1 You can bring her here and do it or you can take the depo and
2 submit it and I'll decide.

3 MR. STEIN: Yeah. And again, Judge, it could be
4 Duetsch and Jones for that matter. I don't have Mr. Smith
5 out there who is suddenly a disgruntled employee of Plum. I
6 don't have that kind of smoking gun.

7 THE COURT: Okay. Look, let's face it, your real
8 issues that you probably want from the Court of Appeals are
9 on the legal issues, right?

10 MR. STEIN: That's true.

11 THE COURT: I assume that once I decide those
12 you'll do what you have to do.

13 MR. STEIN: Well, and that's why I thought actually
14 what you were saying was let's leave this record open on one
15 narrow issue, apparent authority, make the decision then on
16 all, and then we can go up or down or sideways.

17 THE COURT: That's about the equivalent.

18 MR. STEIN: Yes. Absolutely.

19 MS. ADAMS: I'm thinking about this as you're --
20 just some thoughts that come to mind. It's Liberty's
21 position that we can demonstrate both apparent and actual. I
22 understand your view on apparent.

23 And so on the apparent -- we could take and develop
24 the evidence and the record. On the apparent, yes, Lisa
25 Duetsch is important in that, but as would the broker at Aon

1 be important on that.

2 So if your Honor is suggesting that we do Lisa
3 Duetsch's deposition and then give it to you kind of as a
4 step in between -- I guess I want to understand is, that what
5 you're suggesting, because if you're suggesting a trial, it
6 really shouldn't just be limited to Lisa Duetsch. It should
7 permit us to develop both apparent and actual.

8 THE COURT: It should. The reason I was suggesting
9 it is because I really thought -- it doesn't matter if
10 there's actual if there's apparent.

11 MS. ADAMS: Agreed.

12 THE COURT: I actually think the evidence looks so
13 strong for apparent that you've presented already. Mr.
14 Stein, what would you present to overcome that? He told me
15 Duetsch, and now he's saying Duetsch and maybe somebody else.

16 What I'm trying to do is -- I was moved by your
17 comments about what it was going to take now on this very
18 narrow issue to get this to trial, and I thought that's a lot
19 of resources. So I'm trying to work with you to find a way
20 to present this for decision with the least possible
21 expenditure of resources.

22 MS. ADAMS: And I appreciate that. What I don't
23 want to do in the process is limit our ability to prove up
24 full apparent authority and full actual.

25 THE COURT: Okay. So here's the deal. Take your

1 pick. I mean, how do you want to do it? Do you want me to
2 just clear a day, have a trial, or would you rather go out
3 and do trial depositions and submit them to me? If you have
4 another idea, tell me.

5 MR. STEIN: I'm usually pretty fast on my feet, but
6 I really would like the opportunity to think about that.

7 THE COURT: You can even talk to each other and
8 agree on something.

9 MS. ADAMS: And I need to speak to my client about
10 that, too.

11 THE COURT: All right. Here's what we'll do.

12 MS. ADAMS: I mean, if we could do some -- I mean,
13 I don't know if we can do an -- we don't really do different
14 phases at trials but --

15 THE COURT: You can do whatever you want if you
16 agree to it. I will take your record. I think I have a good
17 record now, frankly, but I want to give Mr. Stein a chance to
18 carry his burden on authority, on agency, right.

19 The reason I'm there, I'll just be clear about it,
20 is that I think the defendant's evidence falls a tiny bit
21 short on actual and it's very strong on apparent, and Mr.
22 Stein hasn't seemed to brief it much. If there's more to say
23 about it, I want to hear about it.

24 So come up with any plan you want, submit the plan
25 to me, and I'll -- and if you can't agree, I'll give you one,

1 which will probably be a one-day trial, maybe two, on a date
2 you can agree to.

3 We can go off the record now.

4 (OFF THE RECORD)

5 THE COURT: All right. First of all, I appreciate
6 counsel's presentations and their patience, as well as their
7 excellent written and oral presentations today and leading up
8 to today.

9 The motion for summary judgment is granted on the
10 defendant's motion that the statute does not require that a
11 rejection of UM coverage be attached to the policy as well as
12 in writing. So the fact that it was not attached to the
13 policy in this case is not a bar.

14 The Court concurs with the defendant's arguments
15 regarding the applicable statute and the fact, that's RSA
16 264:15, and the fact that it does not require attachment of a
17 rejection of UM coverage.

18 The Court also grants summary judgment on the
19 insurance policy based arguments advanced by the defendant.
20 The policy provides -- I'm just looking for that provision.
21 The policy provides under the section called changes that the
22 policy contains all the agreements between you and Liberty
23 concerning the insurance afforded. The policy's terms can be
24 amended or waived only by endorsement issued by Liberty and
25 made part of the policy.

1 And the question is whether this is a change, this
2 declaration of UM coverage.

3 The Court does not view it as a change to the
4 policy and cites as authority the Stopher case out of the
5 Seventh Circuit, 1998, 155 F.3d 892, for the proposition that
6 an endorsement is not necessary to effect the rejection
7 despite the policy provision that terms can be amended or
8 waived only by endorsement. It's a very analogous case. But
9 the Court doesn't view this as a change to the policy. The
10 Court views it as a declaration of statutorily required
11 coverage in the way prescribed by the statute.

12 Now, summary judgment is denied as to the issue of
13 whether Ms. Duetsch had authority to decline UM coverage.
14 That order is without prejudice to the parties' ability to
15 either conduct another round of summary judgment practice on
16 that issue or go to trial. It will be a bench trial because
17 no jury trial is available under the law in this case or has
18 been demanded by the plaintiff.

19 We also will move ahead -- I assume I'll hear from
20 you with your answer -- or your plan in how many days? What
21 do you want? Take your pick.

22 MS. ADAMS: I'm leaving the 19th.

23 THE COURT: When do you get back?

24 MS. ADAMS: I get back the 8th.

25 THE COURT: By the 22nd of April. Two weeks from

1 when you get back.

2 MS. ADAMS: It's April. I leave April 19th.

3 THE COURT: Oh, you can tell me before you go.

4 MS. ADAMS: I'll try to tell you before we go.

5 THE COURT: So April 19 is when you leave?

6 MS. ADAMS: Yes.

7 THE COURT: You'll tell me by April 18th.

8 All right. Thank you, counsel.

9 MR. STEIN: Thank you.

10 MS. ADAMS: Thank you.

11 (Conclusion of hearing at 3:45 p.m.)

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C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 7-27-17


SUSAN M. BATEMAN, LCR, RPR, CRR
LICENSED COURT REPORTER, NO. 34
STATE OF NEW HAMPSHIRE